

In the Matter of Christine Zayas, Newark School District
DOP Docket No. 2006-3582
(Merit System Board, decided June 21, 2006)

Christine Zayas, a School Clerk with the Newark School District, represented by Sidney H. Lehmann, Esq., petitions the Merit System Board (Board) for a determination of her entitlement to permanent status.

By way of background, the title of School Clerk was previously part of the Clerical Assessment Program (CAP).¹ The record reflects that the appellant took and passed the CAP examination in 1999. On November 30, 2000, the appointing authority was issued a certification of names from the CAP pool of eligibles in order to fill vacancies in the title of School Clerk. The certification contained the names of 126 eligibles, and the last permanent appointment from the certification was awarded to the eligible in the 87th position on the certification. Although it is not clear from the record, it appears that the appellant's name did not initially appear on the certification because of an error on her part. However, on January 18, 2001, this error was corrected, and the Department of Personnel (DOP) added the appellant's name to the outstanding School Clerk certification. She appeared in the 30th position on the certification. The appointing authority was advised of the addition of the appellant's name on January 18, 2001.

The record reflects that the appellant was appointed to the title of School Clerk on February 5, 2001. Although DOP records contain an unsigned Request for Personnel Action form indicating that the appellant was permanently appointed from an open-competitive list, her appointment was recorded as provisional. In this regard, while the appellant's name was originally added to the November 30, 2000 certification, the DOP subsequently removed her name from the certification. Because the appellant's name was not included on the certification due to an error on her part, the DOP determined that she was entitled only to prospective relief and should not have been added to the outstanding certification. There is no indication in the record that the appointing authority was advised of this action.

In the instant request, the appellant notes that she successfully passed the CAP examination in 1999 and commenced temporary employment in October 2000 with the appointing authority.² She submits a letter dated February 13, 2001 from the appointing authority advising her of her appointment as a "Permanent School Clerk," effective February 5, 2001, and noting that her "appointment is subject to a mandated New Jersey Department of Personnel 90-day working test period." The appellant contends that she should be considered a permanent employee, since she

¹ As of January 2006, CAP examination results are no longer utilized to fill clerical vacancies in local jurisdictions.

² DOP has no record of the appellant's temporary appointment.

passed an examination, appeared on a certification, and has been continuously employed since February 5, 2001.

Despite being provided the opportunity to supplement the record, the appointing authority has provided no arguments or documentation for the Board's review.

CONCLUSION

In *Kyer v. City of East Orange*, 315 N.J. Super. 524 (App. Div. 1998), the court determined that the City of East Orange's ("City") actions in denying Kyer, a seven-year employee, the opportunity to ever achieve permanent status in her competitive career service position, contrary to the Civil Service Act, were so egregious that they warranted a unique remedy.

It is our view that a delicate balance must be struck between the public and private interests that are subject to prejudice when a governmental entity fails to comply with its statutory obligations. Estoppel is not the answer. First, the Supreme Court has precluded that solution. Second, unqualified persons may thereby be afforded an improper route to permanency. But by the same token, it is no solution to leave remediless the well-qualified, experienced, high-performing, long-term provisional employee *who is unaware that her position is not permanent, who in all likelihood would have easily achieved permanency but for the municipal negligence*, and whose summary discharge from employment is as obviously unfair and arbitrary as this jury found plaintiff's to be. [*Kyer, supra*, 315 N.J. Super. at 532-533 (emphasis added)].

Accordingly, the court transferred the case to the DOP to retroactively determine whether Kyer would have qualified for the competitive career service position she provisionally held for seven years and, if so, "to fashion an appropriate remedy." *Id.* at 534. Ultimately, after the remand, the Board determined that, notwithstanding Kyer's years of service or the misdeeds of the appointing authority, she was not entitled to a permanent appointment since she did not meet the open-competitive requirements for the position at the time the provisional appointment was initially made. *See In the Matter of Ruby Robinson Kyer* (MSB, decided May 4, 1999). *See also Melani v. County of Passaic*, 345 N.J. Super. 579 (App. Div. 2001).

In the instant matter, there is no evidence in the record of gross municipal negligence or errors on the part of the DOP. However, there is evidence to support the granting of equitable relief. Specifically, the appellant took and passed the CAP examination. The record indicates that she did not originally appear on the

November 30, 2000 certification due to an error on her part. Because her exclusion from this certification was the result of her own error, she was only entitled to prospective relief, *i.e.*, to appear on future certifications. Nevertheless, the DOP added the appellant's name to the November 30, 2000 certification and advised the appointing authority of this action on January 18, 2001. Although the DOP later became aware of the erroneous addition of the appellant's name to the certification and removed her, there is no record that the appointing authority was ever notified that it could no longer consider the appellant for a permanent appointment from that certification. Based on the evidence in the record, including the appellant's February 5, 2001 appointment, the February 13, 2001 letter from the appointing authority, and the Request for Personnel Action form, it appears that the appointing authority intended to effectuate the appellant's permanent appointment from the November 30, 2000 certification. It must also be emphasized that the appellant was advised in the February 13, 2001 letter that her appointment was subject only to a 90-day working test period, thereby conveying the impression that her appointment was permanent.

Under these circumstances, it is appropriate to recognize the appellant's permanent appointment to the title of School Clerk. The record reflects that she qualified for this title at the time of her appointment, as evidenced by her admission to and passage of the CAP examination, and she was reachable for appointment on February 5, 2001. In addition, there is nothing in the record to indicate that either the appellant or the appointing authority was notified of her erroneous inclusion on the November 30, 2000 certification. Therefore, the certification should be amended to indicate the appellant's permanent appointment, effective February 5, 2001. Moreover, since the record reflects that the appellant has been successfully performing the duties of the position for over five years, she should be considered as having successfully completed her working test period.

ORDER

Therefore, it is ordered that the appellant's request for permanent status as a School Clerk, effective February 5, 2001, be granted.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.